

A
T R E A T I S E
O F T H E
P L E A S
O F T H E
C R O W N :
O R A

S Y S T E M of the Principal Matters relating to that
S U B J E C T, digested under their proper Heads.

B O O K I.

By W I L L I A M. H A W K I N S,
of the *Inner-Temple*, Esq;.

In the S A V O Y,

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one's Fist at him, or by any other such like Act done in an angry threatening Manner; and from hence it clearly follows, That one charged with an Assault and Battery, may be found guilty of the former, and yet acquitted of the later. But notwithstanding the many ancient Opinions to the contrary, it seems agreed at this Day, that no Words whatsoever can amount to an Assault.

Secſ. 2. As to the second Point, *viz.* What shall be said to be a Battery, It seems that any Injury whatsoever, be it never so small, being actually done to the Person of a Man, in an angry, or revengeful, or rude, or insolent, Manner, as by Spitting in his Face, or any Way touching him in Anger, or violently jostling him out of the Way, are Batteries in the Eye of the Law: But it is said to be no Battery to lay one's Hand gently on another whom an Officer has a Warrant to arrest, and to tell the Officer that this is the Man he wants.

Secſ. 3. As to the third Point, *viz.* In what Cases an Assault and Battery may be justified, this is so fully set forth already in the Chapter of *Surety of the Peace*, that there seems to be no need of any farther Consideration thereof in this Place; and therefore I shall only add, That where a Man in his own Defence beats another who first assaults him, &c. he may take an Advantage thereof upon an Indictment, as well as upon an Action; but with this Difference, that in the first Case he may give it in Evidence upon the Plea of Not guilty, and in the later he must plead it specially.

Secſ. 4. As to the fourth Point, *viz.* How unlawful Assaults and Batteries are punished, there is no doubt but that the Wrong doer is Subject, both to an Action at the Suit of the Party, wherein he shall render Damages, &c. and also to an Indictment at the Suit of the King, wherein he shall be fined according to the Heinousness of the Offence.

C H A P. LXIII.

Of Affrays.

IN treating of Affrays, I shall consider,

1. What shall be said to be an Affray.
2. How far it may be suppressed by a private Person.
3. How far by a Constable.
4. How far by a Justice of Peace.
5. In what Manner the several Kinds of Affrays may be punished.

Secſ. 1. As to the first Point, it is said, That the word Affray is derived from the *French* word *Effraier*, to terrify, and that in a legal Sense it is taken for a publick Offence, to the Terror of the People, from whence it seems clearly to follow, That there may be an Assault which will not amount to an Affray; as where it happens in a private Place, out of the hearing or seeing of any, except the Parties concerned; in which Case it cannot be said to be to the Terror of the People; and for this

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this Cause such a private Assault seems not to be inquirable in a Court-Leet, as all Affrays certainly are, as being common Nufances.

4 H. 6. 10. a.
8 Ed. 4. 5. b.

Sect. 2. Also it is said, That no quarrellome or threatening Words whatsoever shall amount to an Affray; and that no one can justify laying his Hands on those who shall barely quarrel with angry Words, without coming to blows; yet it seemeth, That the Constable may, at the Request of the Party threatened, carry the Person who threatens to beat him before a Justice of Peace, in Order to find Sureties.

H. P. C. 135.
23 E. 4. 45. b.
Dal. ch. 8.
Lamb Constable 14.

Sect. 3. Also it is certain, That it is a very high Offence to challenge another, either by Word or Letter, to fight a Duel, or to be the Messenger of such a Challenge, or even barely to endeavour to provoke another to send a Challenge, or to fight, as by dispersing Letters to that purpose, full of Reflections, and insinuating a Desire to fight, &c.

Poph. 158.
3 Inst. 158.
1 Sid. 186.
1 Keb. 694.
Hob. 120,
215.
2 Rol. Ab. 78.

Sect. 4. But granting that no bare Words, in the Judgment of Law, carry in them so much Terror as to amount to an Affray; yet it seems certain, That in some Cases there may be an Affray where there is no actual Violence; as where a Man arms himself with dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People, which is said to have been always an Offence at Common Law, and is strictly prohibited by many Statutes: For by 2 Ed. 3. 3. it is enacted, *That no Man, great nor small, of what Condition soever he be, except the King's Servants, in his Presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also upon a Cry made for Arms to keep the Peace, and the same in such Places where such Acts happen, be so hardy to come before the King's Justices, or other of the King's Ministers doing their Office, with Force and Arms, nor bring no Force in Affray of Peace, nor to go nor ride armed by Night nor by Day, in Fairs, Markets, nor in the Presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to prison, at the King's Pleasure. And that the King's Justices in their Presence, Sheriffs, and other Ministers in their Bailiwicks, Lords of Franchises, and their Bailiffs in the same, and Mayors and Bailiffs of Cities and Boroughs, within the same Cities and Boroughs, and Borough-holders, Constables and Wardens of the Peace within their Wards, shall have Power to execute this Act: And that the Justices assigned, at their coming down into the Country, shall have Power to enquire how such Officers and Lords have exercised their Offices in this Case, and to punish them whom they find, that have not done that which pertained to their Office; and this Statute is farther enforced by 7 Rich. 2. 13. and 20 Rich. 2. 1.*

Lamb. 126.
3 Inst. 160.
76 D.
2 Rol. Ab. 78.
Pl. 4.
H. P. C. 137.

And in the Exposition of it, the following Points have been holden:

Sect. 5. I. That any Justice of Peace, or other Person, who is empowered to execute this Statute, may proceed thereon, either *ex Officio*, or by Force of a Writ out of Chancery formed upon the Statute, and that if he find any Person in Arms contrary to the Form of the Statute, he may seize the Arms, and commit the Offender to Prison; and that he ought also to make a Record of his whole Proceeding, and certify the same into the Chancery, where he proceeds by Force of the said Writ, or into the Exchequer, where he proceeds *ex Officio*.

F. N. B. 249.

3 Inst. 161.
Dal. ch. 22.
Lamb. 168,
&c.
Dalif. 23.
2 Bullf. 330.

Sect. 6. II. That where a Justice of Peace, &c. proceeds upon the said Writ, he may not only imprison those whom he shall find offending against the Statute in his own View, but also those who shall be found by an Inquest taken before him, to have offended in such Manner in his Absence; and I do not see why he may not do the same where he proceeds *ex Officio*; for seeing the said Writ hath no other Foundation but the

Cro. El. 294.
Con. Lamb.
170.

the said Statute, and is the most authentick Explication thereof, it seemeth that the Rules therein prescribed, should be the best Direction for all Proceedings upon that Statute.

Gro. El. 294. *Seç. 7.* III. That the Under-Sheriff may execute the said Writ, being directed to the Sheriff, if it name him only by the Name of his Office; and not by his proper Name, and do not expressly command him to act in his proper Person.

24 Ed. 33. a. b. *Seç. 8.* That a Man cannot excuse the wearing such Armour in Publick, by alledging that such a one threatened him, and that he wears it for the Safety of his Person from his Assault; but it hath been resolved, That no one shall incur the Penalty of the said Statute for assembling his Neighbours and Friends in his own House, against those who threaten to do him any Violence therein, because a Man's House is as his Castle.

21 H. 7. 39. a. *Seç. 9.* V. That no wearing of Arms is within the meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People; from whence it seems clearly to follow, That Persons of Quality are in no Danger of Offending against this Statute by wearing common Weapons, or having their usual Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such Occasions, in which it is the common Fashion to make use of them, without causing the least Suspicion of an Intention to commit any Act of Violence or Disturbance of the Peace. And from the same Ground it also follows, That Persons armed with privy Coats of Mail to the Intent to defend themselves against their Adversaries, are not within the Meaning of this Statute, because they do nothing *in terrorem Populi*.

Crom. 64. a. *Seç. 10.* VI. That no Person is within the Intention of the said Statute, who arms himself to suppress Rioters, Rebels, or Enemies, and endeavours to suppress or resist such Disturbers of the Peace or Quiet of the Realm; for Persons who so arm themselves, seem to be exempted out of the general Words of the said Statute, by that Part of the Exception in the beginning thereof, which seems to allow all Persons to arm themselves upon a Cry made for Arms to keep the Peace, in such Places where such Acts happen.

Poph. 121, 122. *Seç. 11.* As to the second Point, *viz.* How far an Affray may be suppressed by a private Person, it seems agreed, That any one who sees others fighting, may lawfully part them, and also stay them till the Heat be over, and then deliver them to the Constable, who may imprison them till they find Surety for the Peace; also it is said, That any private Person may stop those whom he shall see coming to join either Party; and from hence it seems clearly to follow, That if a Man receive a Hurt from either Party in thus endeavouring to preserve the Peace, he shall have his Remedy by an Action against him; also upon the same Ground it seems equally reasonable, That if he unavoidably happen to hurt either Party, in thus doing what the Law both allows and commends, he may well justify it, inasmuch as he is no Way in Fault; and the Damage done to the other, was occasioned by a laudable Intention to do him a Kindness.

Lamb 131. *Seç. 12.* However it seems clear, That if either Party be dangerously wounded in such an Affray, and a Stander-by, endeavouring to arrest the other, be not able to take him without hurting, or even wounding him, yet he is no Way liable to be punished for the same, inasmuch as he is bound under Pain of Fine and Imprisonment, to arrest such an Offender, and either detain him till it appear whether the Party will live or die, or carry him before a Justice of Peace, by whom he either is to be bailed, or committed, &c.

3 Inst. 138.
Con. Lamb.
531.
Dalt. cap. 8.

Lamb 131.
Dalt. cap. 8.
3 Inst. 158.
Bro. Faux
Imprison-
ment 35. 44.
H P. C. 135.
10 H. 7. 20.
2 Inst. 52.

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Seç. 13. As to the third Point, *viz.* How far an Affray may be suppressed by a Constable; it seems agreed, That a Constable is not only empower'd, as all private Persons are, to part an Affray which happens in his Presence, but is also bound at his Peril to use his best Endeavours to this Purpose, and not only to do his utmost himself, but also to demand the Assistance of others, which if they refuse to give him, they are punishable with Fine and Imprisonment.

3 Inst. 158.
H. P. C. 135.
Lamb. 132,
133.
Dalt. cap. 8.
3 H. 7. 10. b.

Seç. 14. And it is said, That if a Constable see Persons either actually engaged in an Affray, as by Striking, or offering to strike, or drawing their Weapons, &c. or upon the very Point of entering upon an Affray, as where one shall threaten to kill, wound, or beat another, he may either carry the Offender before a Justice of Peace, to the End that such Justice may compel him to find Sureties for the Peace, &c. or he may imprison him of his own Authority for a reasonable Time, till the Heat shall be over, and also afterwards detain him till he find such Surety by Obligation: But it seems, That he has no Power to imprison such an Offender in any other manner, or for any other Purpose; for he cannot justify the committing an Affrayer to Gaol till he shall be punished for his Offence: And it is said, That he ought not to lay Hands on those, who barely contend with hot Words, without any Threats of personal Hurt, and that all which he can do in such a Case, is to command them under Pain of Imprisonment to avoid Fighting.

Lamb 132,
133.
Dalt. ca. 1, 8.

H. P. C. 136.
Dalt. cap 1, 8.
Bro. Surety,
23. 36.
Moore 284.
Pl. 436.
3 H. 4. 9. a.
22 Ed. 4. 35. b.
10 Ed. 4. 18.
5 H. 7. 6. a.
Savil. 97, 98.

Seç. 15. But he is so far intrusted with a Power over all actual Affrays, that though he himself is a Sufferer by them, and therefore liable to be objected against, as likely to be partial in his own Cause, yet he may suppress them; and therefore, if an Assault be made upon him, he may not only defend himself, but also imprison the Offender, in the same manner as if he were no way a Party.

5 H. 7. 6. a.
H. P. C. 136.
1 Rol. Re. 238.
2 Bull. 329.

Seç. 16. And if an Affray be in a House, the Constable may break open the Doors to preserve the Peace; and if the Affrayers fly to a House, and he follow with fresh Suit, he may break open the Doors to take them.

13 Ed. 4. 9. a.
7 Ed. 3. 12. b.
Dalt. cap. 8,
67.
Lamb 133,
134.

Seç. 17. But it is said, That a Constable hath no Power to arrest a Man for an Affray done out of his own View, without a Warrant from a Justice of Peace, unless a Felony were done or likely to be done; for it is the proper Business of a Constable to preserve the Peace, not to punish the Breach of it; nor does it follow from his having Power to compel those to find Sureties who break the Peace in his Presence, that he has the same Power over those who break it in his Absence, inasmuch as in such Case it is most proper to be done by those who may examine the whole Circumstances of the Matter upon Oath, which a Constable cannot do; yet it is said, That he may carry those before a Justice of Peace, who were arrested by such as were present at an Affray, and delivered by them into his Hands.

H. P. C. 135.
Cro. El. 375.
Owen 105.
H. P. C. 136.
H. P. C. 92.

Lamb, 131.
Dalt. cap. 8.

Seç. 18. As to the fourth Point, *viz.* In what manner an Affray may be suppressed by a Justice of Peace; there is no doubt, but that he may and must do all such Things to that Purpose, which a private Man or Constable, are either enabled, or required by the Law to do: But it is said, That he cannot without a Warrant authorize the Arrest of any Person for an Affray out of his View; yet it seems clear, that in such Case he may make his Warrant to bring the Offender before him, in order to compel him to find Sureties for the Peace.

H. P. C. 136.
Dalt. cap. 8.
Bro. false Im-
prisonment
6. 12, 33.
14 H. 8. 7.
Moore 468.
Pl. 551.

See 38 Ed. 3.
6. b. 7. a.
22 Aff. 56.
5 Mod. 84.

H. P. C. 36.
Dalt. cap. 8.
Poph. 153.

Sec. 19. Also it seems, That a Justice of Peace has a greater Power over one who hath dangerously wounded another in an Affray, than either a private Person or a Constable; for there does not seem to be any good Authority, that these have any Power at all to take Sureties of such an Offender: but it seems certain, That a Justice of Peace has a discretionary Power either to commit him or to bail him, till the Year and Day be past; but it is said, that he ought to be very cautious how he takes Bail, if the Wound be dangerous; for that if the Party die, and the Offender appear not, he is in Danger of being severely fined, if he shall appear upon the whole Circumstances of the Case to have been too favourable.

Sec. 20. As to the fifth Point, *viz.* In what manner the several kinds of Affrays are to be punished, it sufficiently appears from the foregoing Part of this Chapter, how such Affrays as are accompanied with Force and Arms, are to be dealt with upon the Statute of *Northampton*; and therefore I shall only examine in this Place, what Penalties other Affrays are liable unto, as to which it is to be observed, That all Affrays in general are punishable by Fine and Imprisonment, the Measure of which is to be regulated by the Discretion of the Judges according to the Circumstances of the Case, which very much vary the Nature of this Crime, and in some Cases make it so inconsiderable as scarce to deserve to be taken Notice of; and in others, make it an Offence of a very heinous Nature, as in the following Instances:

1. In Respect of the dangerous Tendency thereof.
2. In Respect of the Persons against whom it is committed.
3. In Respect of the Place wherein it happens.

Poph. 153.
3 Inst. 158.

1 Sid. 186.
1 Keb. 694.

Moore 563,
Pl. 763.

Sec. 21. And first, An Affray may receive an Aggravation from the dangerous Tendency thereof, as where Persons coolly and deliberately engage in a Duel, which cannot but be attended with the apparent Danger of Murder, and is not only an open Defiance of the Law, but carries with it a direct Contempt of the Justice of the Nation, as putting Men under a Necessity of righting themselves; upon which Considerations, Persons convicted of barely sending a Challenge, have been adjudged to pay a Fine of one hundred Pounds, and to be imprisoned for one Month without Bail, and also to make a publick Acknowledgment of their Offence, and to be bound to their good Behaviour.

Sec. 22. Secondly, An Affray may receive another Aggravation from the Persons against whom it is committed; as where the Officers of Justice are violently disturbed in the due Execution of their Office, as by the Rescous of a Person legally arrested, or the bare Attempt to make such a Rescous; for all the Ministers of the Law are under its more immediate Protection.

12 Co. 101.
1 Keb. 290,
491.
1 Mod. 186.

Sec. 23. Thirdly, An Affray may receive a farther Aggravation from the Place wherein it is committed, and upon this Respect all Affrays in the King's Courts are so severely punished, as hath been shewn already in Chapter 21, and upon the same Account also, all Affrays in a Church or Church-yard, have been always esteemed very heinous Offences, as being great Indignities to the Divine Majesty, to whose Worship and Service such Places are immediately dedicated. And upon this Consideration, all irreverent Behaviour in these Places hath been esteemed so criminal by the Makers of our Laws, that they have not only severely punished such Disturbances in them which are punishable where-ever they happen, as all actual Affrays, &c. but also such, which if they happen elsewhere,

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are not punishable at all; as bare quarrelsome Words, and even such which would be commendable if done in another Place; as Arrests by Vertue of legal Process: But for the better Understanding hereof, I shall consider the several Statutes made for this Purpose.

Seç. 24. And first, It is enacted by 5 and 6 Ed. 6. 4. *That if any Person whatsoever, shall by Words only quarrel, chide, or brawl, in any Church or Church-yard, that then it shall be lawful unto the Ordinary of the Place where the same Offence shall be done, and proved by two lawful Witnesses, to suspend every Person so offending; that is to say, if he be a Layman, ab ingressu Ecclesiæ, and if he be a Clerk, from the Ministration of his Office, for so long Time as the same Ordinary shall by his Discretion think meet and convenient, according to the Fault.*

Seç. 25. And it is farther enacted by the said Statute, *That if any Person shall smite or lay any violent Hands upon any other, either in any Church or Church-yard; that then, ipso Facto, every Person so offending shall be deemed excommunicate, and be excluded from the Fellowship and Company of Christ's Congregation.*

Seç. 26. And it is also farther enacted by the said Statute, *That if any Person shall maliciously strike any Person with any Weapon in any Church or Church-yard, or shall draw any Weapon in any Church or Church-yard, to the Intent to strike another with the same Weapon; that then every Person so offending, and thereof being convicted by Verdict of twelve Men, or by his own Confession, or by two lawful Witnesses, before the Justices of Assize, Justices of Oyer and Terminer, or Justices of Peace in their Sessions, by Force of this Act, shall be adjudged by the same Justices before whom such Person shall be convicted, to have one of his Ears cut off, &c. and besides that every such Person to be, and stand ipso Facto excommunicated, as aforesaid.*

And in the Exposition hereof it hath been holden :

Seç. 27. I. That notwithstanding the Words of the Statute be expressed, That he who smites another in the Church, &c. shall, *ipso Facto*, be deemed excommunicate; yet there ought either to be a precedent Conviction at Law, which must be transmitted to the Ordinary, or else the Excommunication must be declared in the Spiritual Court upon a proper Proof of the Offence there; for it is implied in every Penal Law, that no one shall incur the Penalty thereof, till he be found guilty upon a lawful Trial; also it must be intended in the Construction of this Statute, That the Excommunication ought to appear judicially, for otherwise there could be no Absolution.

Dyer 175.
Pl. 48.
Cro. Ja. 462.
1 Vent. 146.
Lit. 149.
Hett. 86.
Cro. El. 919.

Seç. 27. II. That he who strikes another in a Church, &c. can no way excuse himself, by shewing that the other assaulted him.

Cro. Ja. 367.

Seç. 28. III. That Church wardens, or perhaps private Persons, who whip Boys for playing in the Church, or pull off the Hats of those who obstinately refuse to take them off themselves, or gently lay their Hands on those who disturb the Performance of any Part of divine Service, and turn them out of the Church, are not within the meaning of the Statute.

1 Saund. 13,
14.
1 Sid. 301.
3 Keb. 124.
1 Mod. 168.

Seç. 29. Also it is enacted by 1 Ma. Sess. 2. cap. 3. *That if any Person or Persons, of their own Power and Authority, shall willingly and of Purpose by open and overt Word, Fact, Act, or Deed, maliciously or contemptuously molest, let, disturb, vex or trouble, or by any other unlawful Ways and Means, disquiet, or misuse, any Preacher who shall be licenced, allowed, or authorized to preach by the Queen's Highness, or by any Archbishop, or Bishop of this Realm, or by any other lawful Ordinary, or by any of the Universities of Oxford and Cambridge, or otherwise lawfully authorized or charged, by Reason of his or their Cure, Benefice,*

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fice, or other Spiritual Promotion or Charge, in any of his, or their open Sermon, &c. or if any Person or Persons shall maliciously, willingly, or of purpose, molest, let, disturb, vex, disquiet, or otherwise trouble any Parson, Vicar, Parish-Priest, or Curate, or any lawful Priest, preparing, saying, doing, singing, ministering or celebrating the Mass, or other such divine Service, Sacraments, or Sacramentals, as was most commonly frequented and used in the last Year of the Reign of the late Sovereign Lord King Henry the eight, or that at any Time hereafter should be allowed, set forth, or authorized by the Queen's Majesty; or if any Person or Persons shall unlawfully, contemptuously, or maliciously, of their own Power or authority, pull down, deface, spoil, or otherwise break any Altar or Altars, or any Crucifix, or Cross, in any Church, Chapel, or Church-yard; every such Offender and Offenders, his or their Aiders, Procurers, or Abettors, may be apprehended by any Constable, or Church-warden of the Place where such Offence shall be committed, or by any other Officer or Person then being present at the Time of the said Offence; and being so apprehended, shall be brought before some Justice of Peace by whom they shall be committed forthwith, and within six Days the Matter shall be examined by the same, together with some other Justices; and on Proof by two Witnesses or Confession, the Offender shall be committed for three Months, and also till the next Quarter-Sessions, where if they repent, they shall be discharged upon giving Sureties for their good Behaviour for a Year, and if they do not repent they shall be committed till they do.

2 Jon. 159.
Con. Aleyn
50.
2 Bulst. 51,

Sect. 30. It hath been resolved, That the Disturbance of a Minister in saying the present Common Prayer is within this Statute; for the express mention of such Divine Service, as should afterwards be authorized by Queen Mary, doth implicitly include such also as should be authorized by her Successors; for since the King never dies, a Prerogative given generally to one, goes of Course to others.

Sect. 31. Also it is enacted by 1 Will. and Mar. 18. Par. 19. That if any Person shall willingly and of Purpose, maliciously or contemptuously come into any Cathedral or Parish Church, Chapel, or other Congregation permitted by the said Act, and disquiet or disturb the same, or misuse any Preacher or Teacher, such Persons, upon Proof before any Justice of Peace, by two or more sufficient Witnesses, shall find two Sureties to be bound by Recognizance in the penal Sum of fifty Pounds, and on Default of such Sureties shall be committed to Prison, there to remain till the next General or Quarter-Sessions, and upon Conviction of the said Offence at the said General or Quarter-Sessions, shall suffer the Pain and Penalty of twenty Pounds.

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Of Forcible Entries and Detainers.

Lamb. 135.
Dalt. cap. 76.
Crom. 70.a.b.

Kellw. 92.
Yelv. 172.

Sect. 1. **I**T seems that at the Common Law a Man disseised of any Lands, or Tenements, (if he could not prevail by fair Means,) might lawfully regain the Possession thereof by Force, unless he were put to a Necessity of bringing his Action, by having neglected to re-enter in due Time: And it seems certain, That even at this Day, he who is wrongfully dispossessed of his Goods, may justify the re-taking of them by Force from the Wrong-doer, if he refuse to re-deliver them; for the Violence which happens through the Resistance of the wrongful Possessor, being